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CONTENTS

THE UNEQUAL APPLICATION OF NEW JERSEY'S ARTIFICIAL INSEMINATION ACT

Anthony J. Vecchio[1]

I. INTRODUCTION

New Jersey has long served as a leading state in the gay and lesbian civil rights movement.[2] This trend is most evident in the recent developments of New Jersey courts dealing with the rights of same-sex couples. The most notable recent developments are the New Jersey Supreme Court's decision in *Lewis v. Harris*[3] and the legislation that followed.[4]

The *Lewis* court held that committed same-sex couples must be treated equally under the laws of the State of New Jersey to married heterosexual couples.[5] The decision in *Lewis* painted some very broad strokes regarding the rights of same-sex partners vis-à-vis each other, but the fine print is still far from clear. The practical effects of the decision are yet to be determined. Similarly, questions still remain as to how *Lewis* will impact the familial relationships of gay and lesbian families and the statutory schemes that govern their lives. This article focuses on a right that for many same-sex couples is of utmost

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[1] Anthony J. Vecchio graduated from Rutgers University School of Law – Camden 2008.

[2] Daniel Weiss & Thomas Prol, *After the Ceremony,* 239 APR N.J. LAW. 11 (2006).

[3] 908 A.2d 196 (N.J. 2006).

[4] *See* N.J. STAT. ANN. § 37:1-28 (West 2007).

[5] *Lewis,* 908 A.2d at 221.

importance: the right of a same-sex partner to be deemed the second-parent of a child born through artificial (alternate) means.

Gay and lesbian unmarried couples have been allowed to jointly adopt children in New Jersey since 1997.[6] Similarly, so called "second-parent" adoptions are allowed for gay and lesbian partners.[7] However, the system is seriously flawed, resulting in children being left vulnerable to a slew of potential problems while his or her parents navigate a bureaucratic labyrinth.[8] In response to such concerns, several same-sex couples have petitioned the various New Jersey county courts for pre-birth parental declarations.[9] Those couples have found conflicting results.[10]

Despite the New Jersey Supreme Court's decision in *Lewis,* some New Jersey courts have refused to apply the artificial insemination statute[11] to same-sex couples.[12] In fact, courts that have refused to apply the alternative insemination statute to same-sex couples have commonly stated that the statute should only apply to married couples,[13] and that same-sex couples still remain without the right to marry in New Jersey.[14]

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[6] *See* Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey,* 239 APR N.J. LAW. 35, 35 (2006) (citing Holden v. N.J. Dep't of Human Servs., No. C-203-97 (Bergen County Ct. 1997)).

[7] *Id.* (citing *In re* J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993)).

[8] *See generally id.*

[9] *See, e.g.*, *In re* Robinson, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005) (declaring that same-sex partner was entitled to the statutory presumption of parenthood afforded to husbands); *but see In re* Moses, No. FD-12-226-06C (Middlesex County Ct. 2005) (holding that the Artificial Insemination Statute only applies to married couples).

[10] *See, e.g.*, *In re* Robinson, 890 A.2d 1036; *but see In re* Moses, No. FD-12-226-06C.

[11] N.J. STAT. ANN. § 9:17-44(a) (West 2007).

[12] *See, e.g.*, *In re* Moses, No. FD-12-226-06C (refusing to apply N.J.S.A. § 9:17-44 to a same-sex couple).

[13] *See, e.g., id.*

[14] § 37:1-28, *supra* note 4, (establishing civil unions rather than amending the marriage statutes to include same-sex couples).

I argue primarily that such rulings are impermissible in light of the recent New Jersey Supreme Court's decision in *Lewis*. Alternatively, I argue that those rulings were incorrect even when they were made, and that they remain incorrect regardless of the decision in *Lewis*. Also, I recommend that the New Jersey State Legislature should immediately revise the Artificial Insemination Statute to accord with the holding in *Lewis*. Until then, the relevant ambiguity of the artificial insemination statute[15] should be given a neutral reading in terms of gender and sexual orientation. These recommendations seek most importantly, the best interests of children, as well as, the guarantee of fundamental rights of *all* parents and judicial uniformity.[16]

II. HISTORY

A. THE BEST INTEREST OF THE CHILD STANDARD

In New Jersey, the best interest of the child standard is always used in judicial determinations of parentage.[17] Indeed, the best interest of the child is a public policy that courts hold above the interests of a parent.[18] Parents, of course, have rights themselves that arise out of their relationships with their children. These rules, however, are more technical than the best interest of the child standard and require statutory analysis.

By law, a woman is the natural mother of a child to whom

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[15] § 9:17-44(a), *supra* note 11, provides, in pertinent part: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."

[16] Courts use the "best interests of the child" standard when making decisions regarding the adoption of children. *See generally* Erica Gesing, *The Fight To Be A Parent: How Courts Have Restricted The Constitutionally-Based Challenges Available To Homosexuals*, 38 NEW ENG. L. REV. 841 (2004).

[17] Kinsella v. Kinsella, 696 A.2d 556, 577 (N.J. 1997) (explaining that the primary and overarching consideration in custody determination is the best interest of the child).

[18] *In re* Baby M, 525 A.2d 1128, 1132 (N.J. Super. Ct. Ch. Div. 1987), *rev'd on other grounds*, 537 A.2d 1227 (N.J. 1988).

she gives birth.[19] A man is presumed to be the biological father of the child under certain circumstances.[20] These circumstances include when a man is married to the biological mother of the child at the time of birth. Such presumptions can be rebutted only be clear and convincing evidence.[21]

B. THE STATE OF SAME SEX COUPLES' RIGHTS IN NEW JERSEY

Prior to the New Jersey Supreme Court's decision in *Lewis*, Massachusetts was the only state to give full equality to same-sex couples.[22] States allowing same-sex couples to enter into civil unions include Vermont[23] and Connecticut,[24] while Hawaii has a statutory scheme that establishes many marriage-like rights.[25] Currently, forty-four states have legally barred same-sex marriages.[26]

States that refuse to allow same-sex couples to marry have not shown an inclination to recognize such marriages that were consummated in other jurisdictions. This naturally raises the issue of a possible violation of the Federal Constitution's Full Faith and Credit Clause,[27] which requires states give full faith

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[19] N.J. STAT. ANN. § 9:17-41(a) (West 2007).

[20] *Id.* § 9:17-41(b).

[21] *Id.*

[22] Weiss & Prol, *supra* note 2, at 12 (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that the constitution of the Commonwealth of Massachusetts prohibits denial of marriage licenses to same-sex couples and ordering the extension of full equal marriage rights to homosexuals)).

[23] *Id.* at 12 (citing Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that under the Vermont State Constitution, same-sex couples are entitled to "obtain the same benefits and protections afforded by Vermont law to married opposite sex-couples")).

[24] Connecticut was the first state to establish civil unions without a court order. *Id.* at 12.

[25] *Id.*

[26] *Id.*

[27] U.S. CONST. art. IV, § 1.

and credit to the legal proceedings and judgments of all other states.[28] However, the water becomes incredibly murky when one considers the Defense of Marriage Act (DOMA)[29] with reference to the Full Faith and Credit Clause.

The DOMA was signed into law on September 21, 1996, by President Clinton. The DOMA provides that neither the federal government nor the states "shall be required to give effect to any…relationship between persons of the same sex that is treated as a marriage under the laws of such other State…."[30] A total of seventeen states have enacted constitutional amendments modeled after the DOMA, and twenty-seven have enacted comparable statutes.[31] Some states have gone to even greater lengths to oppose same-sex marriages by declaring that same-sex marriages performed in other jurisdictions are invalid *per se*.[32]

Lewis may come to represent the apex in New Jersey's struggle over the rights of same-sex couples. As mentioned above in *Lewis*, the Supreme Court held that committed same-sex couples are entitled to the same fundamental rights as married heterosexual couples.[33] The Court gave the New Jersey State Legislature 180 days to decide whether the Garden State would feature either gay marriage or gay civil unions.[34] The republican and democratic caucuses in the New Jersey State Legislature reached a compromise by selecting the latter.[35]

The *Lewis* decision came less than three years after former Governor James McGreevey signed the New Jersey Domestic Partnership Act (DPA) into law.[36] The DPA

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[28] Mills v. Duryee, 11 U.S. 481 (1813).

[29] 28 U.S.C. § 1738c (1996).

[30] *Id.*

[31] Weiss & Prol, *supra* note 2, at 12.

[32] *Id.*

[33] *Lewis*, 908 A.2d at 221.

[34] *Id.* at 224.

[35] §37:1-28, *supra* note 4, at (f).

[36] P.L. 2003, c. 246, enacted Jan.12, 2004; the law took effect July 10, 2004. N.J. STAT. ANN. § 26:8A-1 (West 2007).

incorporated several important public policy findings by the New Jersey State Legislature.[37] The Legislature stated:

> [t]here are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships with another individual... [and t]hese familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for...their participants.[38]

The Legislature also stated that "[a]ll persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey...."[39] Under the DPA, partners who met certain requirements were allowed to make critical health care decisions for each other, visit each other in hospitals as next of kin, and take advantage of various tax credits.[40]

For all its merit, the DPA fell far short of providing actual legal equality for same sex-couples.[41] While the act provided those couples with a number of important rights, they were still denied many benefits and privileges enjoyed by their similarly situated heterosexual counterparts.[42] The rights enjoyed by married couples, but denied to same- sex couples under the DPA, included tax deductions for spousal medical expenses, the ability to make surname changes without petitioning a court, and survivor benefits under New Jersey's Workers' Compensation Act.[43] Notwithstanding the fact that domestic partners enjoyed fewer rights and benefits than opposite sex

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[37] Weiss & Prol, *supra* note 2, at 11.

[38] § 26:8A-2.

[39] *Id.*

[40] Weiss & Prol, *supra* note 2, at 11. *See also* § 26:8A-2(c), (d).

[41] *Id. See also Lewis*, 908 A.2d at 215.

[42] Weiss & Prol, *supra* note 2, at 11; *See also Lewis*, 908 A.2d at 215.

[43] *Lewis*, 908 A.2d at 215.

couples who entered into marriage, the DPA required far more stringent requirements of those who sought to enter into a domestic partnership.[44]

Perhaps the most striking limitation of the DPA was its lack of protection for same-sex couples under New Jersey's family laws.[45] For example, the Act failed to even mention crucial issues concerning custody, visitation, and child support in the event that a domestic partnership terminates.[46] Furthermore, the DPA failed to provide a presumption of dual parentage to the non-biological parent of a child born to a domestic partner.[47] This particular failure has lead to domestic partners having to rely on costly, time-consuming, and cumbersome second-parent adoption proceedings.[48]

The failure of the DPA to provide financial, legal, and economic equality to same- sex couples has not only had a devastating impact on those couples, but on their children as well.[49] With far less benefits and protections available, such children have been significantly disadvantaged in a way that children in married heterosexual homes have not.[50] Obviously, children being raised by same-sex couples have the same needs and wants as those being raised by "traditional families."[51]

Having described the inadequacy of the DPA, it quickly becomes apparent why the momentum of the movement toward

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[44] *Id.* at 217. "The Act requires that those seeking a domestic partnership share 'a common residence;' prove that they have assumed joint responsibility 'for each other's common welfare...;"agree to be jointly responsible for each other's basic living expenses . . . ;' and show that they 'have chosen to share each other's lives in a committed relationship of mutual caring.'" *Id.* (quoting N.J. STAT. ANN. § 26:8A-4(b)(1), (2), (6) (West 2007)).

[45] *Lewis*, 908 A.2d at 216.

[46] *Id.*

[47] *Id.*

[48] *Id. See generally*, Petitioners' Brief in Support of Complaint, *In re Robinson*, 890 A.2d 1036.

[49] *Lewis*, 908 A.2d at 216.

[50] *Id.*

[51] *Id.* at 216-17.

full equality for same-sex couples was largely unmitigated by the passage of the Act. At worst, the Act was a half-hearted attempt to pacify the gay and lesbian community without actually accomplishing much.[52] In a light most favorable to the DPA, the Act can be seen as having served as a helpful, and perhaps necessary bridge between the status quo ante and the decision in *Lewis*.

The plaintiffs in *Lewis* argued that the fundamental right to marry should apply to homosexuals as well as heterosexuals.[53] However, no Supreme Court decision cited by the plaintiffs directly implicated the right of same-sex couples to marry.[54] Therefore, the *Lewis* court focused its fundamental right analysis on the concept of liberty protected by Article 1, Paragraph 1 of the New Jersey State Constitution.[55]

Despite New Jersey's long tradition of advancing the rights of gays and lesbians, the *Lewis* court held that same-sex marriage is not "so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right."[56] Instead of framing its decision around a fundamental right to marry, the court instead looked to the Equal Protection principles of the New Jersey State Constitution.[57]

Article 1, Paragraph 1 of the New Jersey State Constitution states the central principle of the state's governmental charter—that every person possesses the "unalienable rights" to enjoy life, liberty, property, and the pursuit of happiness.[58] This guarantee

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[52]Ironically, this pacification was sealed into law with the signature of a homosexual governor.

[53] *Lewis*, 908 A.2d at 207, 10-11. *See* Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967) (holding that Virginia's anti-miscegenation statutes that criminalized interracial marriages violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

[54] *Lewis,* 908 A.2d at 210.

[55] *Id.*

[56] *Id.* at 211.

[57] *Id.*

[58] *Id.*

has been expansively construed to entitle *every* person of the state to equal protection under the laws.[59] The *Lewis* court held that Article I, Paragraph 1 of the State Constitution protects not only the rights of the majority, but also the disadvantaged and disfavored.[60] Accordingly, to deny committed same-sex couples financial benefits, social benefits, rights, and privileges that are enjoyed by their married, heterosexual counterparts violates the equal protection guarantee of Article I.[61]

While some argue that the court in *Lewis* did not go far enough,[62] the language of the decision is broad, and includes the requirement that the state provide full statutory rights and benefits to same-sex couples.[63] This should certainly be interpreted to apply not only to those couples themselves, but also to their families and children.[64]

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[59] *Id.* (citing Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306 (N.J. 2003)).

[60] *Id.* at 220.

[61] *Id.* at 220-21.

[62] *See, e.g.*, John R. Bohrer, *New Jersey Civil Unions: Nothing to Celebrate*, THE HUFFINGTON POST, Dec. 14, 2006, http://www.huffingtonpost.com/36351.html (arguing that civil unions do not work, are discriminatory, and hurt families).

[63] *See generally* Robert G. Seidenstein, *Gay Marriage: 'Center' Stage*, NEW JERSEY LAWYER, October 30, 2006 at 1.

[64] *See Lewis*, 908 A.2d at 218. The court stated:

> Disparate treatment of committed same-sex couples . . . directly disadvantages their children. We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers' Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the children of married parents receive such assistance.

Id.

C. THE RIGHTS OF SAME-SEX COUPLES TO ADOPT IN NEW JERSEY

Adoptions in the United States are regulated by state statutory schemes.[65] These statutes can be traced back to 1851, when Massachusetts passed its first adoption statute.[66] Many state adoption statutes do not mention the issue of same-sex couple adoption. Accordingly, courts often find themselves in the difficult position of being asked to interpret such statutes when deciding adoption cases involving same-sex couples. This can be a challenging task given that many state adoption statutes were written before recent advances in the gay and lesbian civil rights movement.

Florida, Mississippi, and Utah have legally barred homosexuals from adopting children.[67] Similarly, the states of Wisconsin and Colorado have interpreted their statutes as barring adoptions by homosexuals.[68] While most states do allow homosexuals to adopt children, many prevent same-sex couples from adopting jointly.[69] In such instances, one partner must singly adopt a child, and then the other partner must apply to adopt the child as a "second-parent."[70]

In the case of alternate insemination, such second-parent adoptions are commonly known as "co-parent" adoptions.[71] Many state legislatures have come to recognize the increasing commonality of such instances, and have written so-called "step-parent" exceptions into their adoption statutes.[72] These

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[65] Note, *Joint Adoption: A Queer Option?* 15 VT. L. REV. 197, 199 (1990).

[66] *Id.* at 200.

[67] Molly Cooper, *What Makes a Family?* 42 FAM. CT. REV. 178, 181 (2004).

[68] Joyce F. Simms, *Homosexuals Battling The Barriers of Mainstream Adoption and Winning*, 23 T. MARSHALL L. REV. 551, 564 (1998).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 559.

[72] *Id.* (citing Julia Frost Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055 (1995)).

exceptions allow for the adoption of a child by a non-biological adult without affecting the parental rights of the biological parent.[73] Some states do not have "step-parent" exceptions to their adoption statutes. In those states, prospective adoptive parents and their counsel have found great success arguing that the allowance of such "co-parent" adoptions complies with the statutory test applied in all adoption cases.[74] The test requires the consent of the legal parent or guardian and that such adoption will be in the child's best interests.[75]

New Jersey helped pave the way for joint adoption by same-sex couples by becoming the first state to allow such adoptions.[76] New Jersey previously had a policy prohibiting such joint adoptions.[77] Fortunately, that policy was abrogated as part of an out of court settlement.[78] The settlement resolved a class-action lawsuit that was filed in 1997 by the American Civil Liberties Union (ACLU) against the New Jersey Division of Youth and Family Services.[79]

Same-sex partners have been allowed to become adoptive second parents in New Jersey since 1993.[80] In all adoption cases, New Jersey courts apply the "best interests of the child" standard.[81] In applying that standard, many courts have recognized the universal acceptance that a psychological parent-

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[73] *Id.* at 560 (citing Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers To Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 554 (citing Kelly Heyboer, *State Clears Adoption by Gay Couples*. Landmark Settlement Assures Equal Rights for Wed, Unwed Pairs, THE STAR-LEDGER (Newark N.J.), Dec. 19, 1997, at 001).

[77] *Id.* at 554-55.

[78] *Id.*

[79] *Id.*

[80] Felice T. Londa, *Two Mommies or Two Daddies*, 239 APR N.J. LAW 27, 28 (2006) (citing *In re* J.M.G., *supra* note 7, at 550 (holding that plaintiff had right to adopt natural child of lesbian partner with consent of the natural parent)).

[81] *In re* J.M.G., *supra* note 7 at 552.

child relationship can exist between a child and a non-biological adult.[82] In such instances, the best interests of the child undoubtedly include the preservation of those parent-child relationships.[83]

There have also been several New Jersey county court cases where the female partner of an alternatively inseminated woman has been deemed a parent during pregnancy.[84] One such case occurred in Sussex County in 2003 and is believed to have been a case of first impression throughout the United States.[85] The Sussex County case involved two lesbian partners that were both biologically related to the fetus.[86] The egg of one partner was donated to the other partner, who carried the fetus to term. The opinion of the court included three important decisions: 1) both parents were pronounced legal parents of the child, 2) both would share responsibility for raising the child, and 3) each partner would be granted automatic custody rights if anything were to happen to the other parent.[87]

Another such case was *In re Parentage of the Child Robinson*.[88] In *Robinson*, Judge Patricia M. Talbert of the Essex County Chancery Division held that the same-sex domestic partner of an alternatively inseminated woman could be deemed the legal parent of that women's child.[89] In *Robinson*, the same-sex partner of an alternatively inseminated woman sought to

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[82] Londa, *supra* note 80, at 28.

[83] *Id.*

[84] *Id.* at 29.

[85] *Id.*

[86] *Id.* The case occurred before the effective date of New Jersey's Domestic Partnership Act. *Id.*

[87] *Id.*

[88] *Id.* (citing *Robinson*, 890 A.2d 1036). The plaintiffs, Kimberly Robinson and Jeanne LoCicero (the non-birth parent) met and began to live together in the fall of 2003. They entered in a domestic partnership in Brooklyn on December 26, 2003, under the laws of the State of New York. On August 7, 2004, the couple married in Niagara Falls, Ontario, Canada. 890 A.2d at 1038.

[89] Londa, *supra* note 80, at 29.

become the adoptive second-parent of that child.[90] On March 21, 2005, the couple filed a Verified Complaint to Establish Maternity, seeking a pre-birth judgment declaring the non-biological mother a legal parent of the child.[91] They argued that at the heart of the Artificial Insemination Statute was parentage, not simply paternity.[92] Judge Talbert agreed, and applied New Jersey's artificial insemination statute[93] to the same-sex couple and ruled that solidifying the family's legitimate legal status was in the child's best interests.[94]

Alternatively, some New Jersey county courts have refused to issue pre-birth declaratory judgments granting automatic parental rights to same-sex partners of alternatively inseminated women.[95] One such case occurred in Middlesex County in 2006, where Judge Ciuffani[96] refused to apply New Jersey's Artificial Insemination Statute to a same-sex couple.[97] The couple was seeking a pre-birth parental declaration of parentage for the non-biological parent.[98] Unfortunately for the couple and child, Judge Ciuffani ruled that the family must instead pursue the traditional adoption route.[99] It was noted

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] N.J. STAT. ANN. § 9:17-44 (West 2007).

[94] *In Re* Robinson, *supra* note 9, at 1036.

[95] *See, e.g.*, *In Re* Moses, *supra* note 9 (refusing to apply the artificial insemination statute's default parentage provision to a woman).

[96] A "confidential" source claims that the petition was originally unopposed by the state until Judge Ciuffani requested that the Office of the New Jersey Attorney General file a brief opposing the couple's petition.

[97] The couple entered into a civil union under the laws of the State of Vermont and later became domestic partners in New Jersey under N.J. STAT. ANN. § 26:8A-1 (West 2007).

[98] *In re* Moses, *supra* note 9.

[99] *Id.* The couple ultimately decided to abandon the appeals process and pursue the traditional adoption route to ensure that the best interests of their daughter were provided for.

that statutory construction should begin with consideration of the statute's plain language.[100] Given that standard, Judge Ciuffani reasoned that since the Artificial Insemination Statute includes the term 'husband,' the statute should only apply to couples who are married.[101] It can be argued that this case was wrongly decided since the court completely ignored the issue of constitutionality. Nevertheless, same-sex couples are still not allowed to marry despite the New Jersey Supreme Court's decision in *Lewis*.[102]

A similar case occurred in Ocean County before Judge Kline, in which a lesbian couple petitioned the court to allow the name of a biological mother's domestic partner to be placed on the child's birth certificate.[103] The couple's petition was opposed by the state's Bureau of Vital Statistics.[104] Judge Kline refused to grant the couple relief, reasoning that since the wording of New Jersey's artificial insemination statute[105] included the term 'husband,' the statute could not be given a gender-neutral reading.[106] Additionally, in Burlington County before Judge Lihogz,[107] a same-sex couple petitioned the court for a pre-birth order allowing the non-biological parent's name be placed on the child's birth certificate. The couple's petition became moot when the child was born during the course of the proceedings. Since Burlington County does not require a home study, Judge Lihogz granted an oral amendment to the couples petition and awarded the couple an immediate adoption, thus avoiding dealing with the issue surrounding the Artificial Insemination

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[100] Merin v. Maglaki, 599 A.2d 1256 (N.J. 1992); Renz v. Penn Central, 435 A.2d 540 (N.J. 1981).

[101] *In re* Moses, *supra* note 9.

[102] *Lewis*, 908 A.2d at 221.

[103] The case is unreported and the names of the parties were not released.

[104] The New Jersey Bureau of Vital Statistics has been tireless in opposing such petitions across the state.

[105] § 9:17-44.

[106] Interview with William S. Singer, Partner, Singer & Fedun (Oct. 16, 2006).

[107] The case is unreported and the names of the parties were not released.

Statute altogether.[108]

The expense of time, money, and energy involved in appealing rulings denying pre-birth relief are great. Navigating the appeals system is a daunting task for a family, and the results that system may yield are unpredictable. Conversely, while the adoption process in New Jersey can be time consuming and costly, the result is certain and the steps are manageable. Furthermore, the laws of New Jersey serve to motivate couples to seek adoption rather than pre-birth relief by allowing tax credits for the former but not the latter.[109]

III. THE INADEQUACY OF THE CURRENT STATE OF THE ISSUE

A. ADOPTION PROCEDURES

In New Jersey, judicial review of adoption procedures is largely controlled on a county-by-county basis.[110] With this lack of uniformity, adoptions by same-sex couples can be extremely difficult depending on the county of residence.[111] Difficulties arise as couples face issues including home studies, expenses, and documentation.[112]

Home studies are required by the majority of New Jersey counties.[113] The cost of the home study is incurred by the prospective adoptive parents.[114] Counties often seek appointment of their preferred home study agencies regardless of cost, virtually binding the prospective parents to an agency

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[108] Interview with William S. Singer, Partner, Singer & Fedun (Oct. 16, 2006).

[109] *Id.*

[110] *See* Guston & Singer, *supra* note 6, at 35.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

that the parents may or may not desire to use.[115] Counties that do not require home studies often require prospective parents to complete various other prerequisites, such as criminal background checks, submission of affidavits of reference and verification of the relationship between the legal parent and the proposed adoptive parent.[116]

The verification process is far more cumbersome for same-sex couples than their heterosexual counterparts.[117] For example, heterosexual couples must simply submit sworn affidavits showing that they are married in order to qualify, while same-sex couples have a significantly higher persuasive threshold to meet.[118] Further, upon entering adoption judgments, many counties enter judgments that do not contain the name of the child.[119] In such cases, the only document relating the child to the adoptive parents is the birth record.[120] These situations are troublesome since birth records need not be recognized by other jurisdictions under the Constitution's full faith and credit provisions.[121]

Same-sex couples seeking to adopt from foreign countries face yet another obstacle in navigating the adoption process.[122] In such cases, the same-sex couple must typically participate in two different court proceedings in New Jersey: the foreign re-adoption, and a second-parent adoption.[123] This results from the

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[115] *See* Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey,* 239 APR N.J. LAW. 35, 35 (2006) (citing Holden v. N.J. Dep't of Human Servs., No. C-203-97 (Bergen County Ct. 1997)).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See* Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey,* 239 APR N.J. LAW. 35, 35 (2006) (citing Holden v. N.J. Dep't of Human Servs., No. C-203-97 (Bergen County Ct. 1997)).

[121] *Id.*

[122] *Id.*

[123] *Id.*

practice of many counties refusing to allow the filing of a joint petition to adopt.[124]

Ironically, in attempting to streamline the process for state residents seeking to adopt foreign children, the state has actually further complicated the process for same-sex couples.[125] This occurred as New Jersey amended its parental statutes to require both the state and its agencies to recognize judgments of adoptions of foreign courts.[126] It was believed that this would create greater efficiency in the adoption process by allowing an administrative process to issue a New Jersey birth certificate, rather than forcing couples to petition the courts for adoptive judgments and then have a record issued.[127] However, this may further have complicated the process since the records of foreign nations are not always covered under the Constitution's full faith and credit provision.[128]

B. CHILDREN ARE BEING PUT AT RISK

When a same-sex partner seeks to adopt the child of his or her partner, the former must wait long periods of time and overcome significant legal challenges.[129] During the waiting period, the child is left vulnerable to a slew of potential problems.[130] These problems are caused, as a leading practitioner puts it, from "bureaucracy, misguidedness, and a hint of homophobia."[131]

Some of these problems involve the possibility of the death

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[124] *Id.*

[125] *Id.*

[126] *See* Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey*, 239 APR N.J. LAW. 35, 35 (2006) (citing Holden v. N.J. Dep't of Human Servs., No. C-203-97 (Bergen County Ct. 1997)).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Interview with William S. Singer, Partner, Singer & Fedun (Oct. 16, 2006).

or incapacitation of the one legal parent during the long waiting period.[132] In this case, the child would be without a legal parent to care for him/her.[133] Additionally, the child would be without the benefit of the prospective second parent's health insurance during the period between his or her birth and the completion of the adoption proceedings.[134] Furthermore, the child may be subject to severe insurance restrictions even after those proceedings are completed due to pre-existing health conditions.[135]

The economic security of children is also put at risk from this perilous situation.[136] Affected children would not be entitled to additional financial support from the prospective second parent.[137] They would also lose the ability to inherit from that person free of the 15% New Jersey inheritance tax.[138]

Most importantly, the child is left without two parents. The relationship between the child and the partner of their legal parent would be left without protection, leaving the family in a perpetual state of single-parenthood. Children raised by single parents are greatly disadvantaged as compared to children raised by two parents.[139] For example, children raised by single parents are two to three times more likely to have emotional and behavioral problems than children raised in two-parent families.[140] They are also more likely to abuse drugs, get into trouble with the law, drop out of high school, and get pregnant as teenagers.[141]

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[132] *See generally,* Petitioners' Brief, *In re* Robinson, *supra* note 48.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] N.J. STAT. ANN. § 54:34-2 (a) (West 2007).

[139] KAREN L. SWISHER, SINGLE-PARENT FAMILIES 11 (Greenhaven Press 1997).

[140] *Id.* at 11.

[141] *Id.*

IV. IMPLICATIONS

A. PUBLIC POLICY IMPLICATIONS

Opposition to gay and lesbian adoption (and gay rights in general) has deep roots in the United States stemming from both religious and secular sources.[142] Religious opposition in the United States comes primarily from Christian groups, which have long espoused the belief that homosexuality goes against the Christian understanding of human sexuality and its meaning.[143] Secular notions such as natural law also serve as a root cause of discrimination against same-sex couples.[144] These religious and secular views largely fuel negative modern social narratives[145] that often result in prejudicial obstacles for same-sex couples seeking equality under the law. These narratives include notions of "traditional families" and the deviancy of homosexuality.[146]

According to many experts, such as Scott Dibartolo, M.D., a Child Study Center researcher at Yale University, those beliefs are completely unfounded.[147] However, after New Jersey became the first state to allow same-sex unmarried couples to jointly adopt, fervent opposition was expressed by conservative interest groups.[148] Such groups included the Christian Coalition and the Family Research Council.[149] The latter group claimed that the

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[142] Timothy E. Lin, *Social Norms and Judicial Decision Making: Examining The Role Of Narratives In Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 777 (1999).

[143] *See id.* (citing CHARLES CURRAN, CATHOLIC MORAL THEOLOGY IN DIALOGUE 202 (1971)).

[144] Erica Gesing, *supra* note 16, at 841.

[145] *Id.*

[146] *Id.*

[147] Molly Cooper, *What Makes A Family?* 42 FAM. CT. REV.178 (2004).

[148] Julie Brienza, *Joint Adoptions By Gays Are Put on Even Ground with Heterosexual Couples*, 34 TRIAL 98 (1998).

[149] *Id.*

policy would be a "loss for children."[150] Ironically, coordinated opposition to the policy came almost exclusively from religious and political organizations, rather than children's advocacy groups.[151] In fact, respected children's groups rarely oppose gay and lesbian adoptions.[152]

The National Adoption Information Clearinghouse reported in 2002 "that approximately ten percent of the population in the United States – or 25 million individuals – are homosexual."[153] Further, "as of 1990, an estimated 6 to 14 million children ha[d] a homosexual parent. And between 8 and 10 million children [were] being raised in [homosexual] households."[154] In 2000, 21.6% of lesbian homes and 5.2% of male homosexual homes were reported to have children in the home.[155] As made clear by such empirical data, an increasing number of American families are "non-traditional" in the sense that either one or both parents are homosexual. New Jersey is no exception to this phenomenon. Currently, there are more than 16,000 same-sex couples living in committed relationships across the state.[156]

A person's sexual orientation simply has no bearing on his or her capacity to be a good parent. In fact there is a "remarkable absence of distinguishing features between the lifestyles, childrearing practices, and general demographic data" between same couples and their heterosexual counterparts.[157] The

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *See generally*, Erica Gesing, *supra* note 16, at 845, (citing Gay and Lesbian Adoptive Parents: For Professionals and Parents, Adoption Family Center, http://www.adoptionfamilycenter.org/resources/adoption/gayandlesbian/gl-issues.htm (2000)).

[154] *Id.*

[155] *Id.*

[156] Ruth Padawer, *Gay Couples, At long Last, Feel Acknowledged*, THE RECORD, August 15, 2001.

[157] Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 HUM. RTS. 7 (1999), (citing Beverly Hoeffer, *Children's*

American Psychological Association (APA) has reported that:

> [n]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.[158]

Lynn Wardle, a Brigham Young University Law Professor, recently published an article in the University of Illinois Law Review in opposition to homosexuals' right to adopt.[159] Professor Wardle claims that most of the research of gay and lesbian parenting is "based on very unreliable quantitative research, flawed…and provide a very tenuous empirical basis for setting public policy."[160] Professor Wardle and others have made a number of public policy arguments that have been widely accepted and cited by those who oppose gay and lesbian adoption.[161]

It is argued that same-sex couples are more promiscuous than their heterosexual counterparts, resulting in familial instability.[162] However, this conclusion is both incorrect and factually unsupported.[163] Long-term homosexual relationships

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Acquisition of Sex-Role Behavior in Lesbian-Mother Families, 51 AM. J. ORTHOPSYCHIATRY 536 (1981)).

[158] *See Gibson*, *supra* note 157, at 8 (citing American Psyhological Association (APA), Lesbian And Gay Parenting: A Resource For Psychologists 8 (1995)),

[159] Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, U. ILL. L. REV. 833 (1997).

[160] *Id*. at 844.

[161] *Id*.

[162] Lin, *supra* note 142, at 773.

[163] *Id*.

are indeed both common[164] and increasing in number.[165] One commentator has noted that "gay and lesbian couples can and do form life-long commitments…that in fundamental ways…resemble companionate marriage between people of different sexes."[166]

It is also argued that homosexuals are more likely than heterosexuals to molest and abuse their children.[167] Gay men are particularly singled out as leaders among sexual predators.[168] A telling example of this stereotype is the case of a bisexual man who was incessantly questioned by a court as to whether he would molest his child during an adoption proceeding.[169] By stark contrast to this common misconception, numerous studies have established the fact that homosexuals are actually less likely to molest their children than their heterosexual counterparts.[170] Further research has concluded that the use of

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[164] *Id.* Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men,* 46 U. MIAMI L. REV. 511, 561 (1992).

[165] Lin, *supra* note 142 at 773*;* Devjani Mishra, Note*, The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians,*30 COLUM. J.L. & SOC. PROBS. 91, 93-94 (1996); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children,*71 IND. L.J. 623, 646 (1996) (noting frequently cited concerns of judges disapproving of adoption by same-sex couples); Shaista-Parveen Ali, *Comment, Homosexual Parenting: Child Custody and Adoption,* 22 U.C. DAVIS L. REV. 1009, 1013-20 (1989).

[166] Lin, *supra* note 142 at 773; Jennifer Gerada Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage,* 68 SO. CAL. L. REV. 745, 751 (1995).

[167] *See, e.g.*, *In re* Pima County Juvenile Action B – 10489, 727 P.2d 830 (Ariz. Ct. App. 1986); *In re* J.S. & C., 324 A.2d 90 (N.J. Super. Ct. Law Div. 1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976); Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interests of the Child,* 45 U. KAN. L. REV. 49, 66 (1996); Mishra, *supra* note 165, at 96 (noting that the "misimpression that gay men 'are much more sexual' than heterosexuals contribute[s] to the belief that there is a link between same-sex orientation and pedophilia, such that gay men cannot be trusted around children").

[168] Lin, *supra* note 142 at 775*;* Mishra, *supra* note 165, at 96.

[169] *In re* Pima County, *supra* note 167, at 835.

[170] Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research,* 2 DUKE J. GENDER L. & POL'Y 207, 216

force in homosexuality is extremely uncommon, and that "homosexuals as a group are not [sexually] oriented toward children."[171] Statistical data also establishes that the "vast majority" of molestation cases involve heterosexual fathers and their daughters.[172] Indeed, heterosexual men in general are the leading perpetrators of child molestation.[173]

Some courts have also reiterated the commonly held belief that children raised in homosexual households are more likely to become homosexual themselves.[174] One Kentucky court stated that a child might "have difficulties in achieving a fulfilling heterosexual identity" when it denied custody of that child to its lesbian parent.[175] In Missouri, another court conditioned child custody to a lesbian parent on the parent's termination of her same-sex relationship.[176] The Missouri court justified its decision on the grounds that exposure to a homosexual

("[R]esearch on the sexual abuse of children shows that offenders are disproportionately heterosexual men."); Mark Strasser, *Family, Definitions, and the Constitution on the Antimiscegenation Analogy,* 25 SUFFOLK U. L. REV. 981, 1027 (1991) (finding that "heterosexual men are statistically more likely to be child molesters"); Strasser, *supra* note 167, at 69 (arguing that heterosexual men are more likely to molest children than gays or lesbians); Ali, *supra* note 165, at 1019 ("[C]ourts should consider homosexuals as less likely to molest their children."); Marilyn Riley, Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied,* 12 SAN DIEGO L. REV. 799, 862 (1975) ("[S]exual molestation in our culture is essentially a heterosexual male act."); David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents,* 36 VILL. L. REV. 1665, 1684 (1991) ("Studies show that most child molestations are committed by heterosexual men with female victims."), Steve Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 880-81 (1985) ("Research on the sexual abuse of children, however, shows that offenders are, in disproportionate numbers, heterosexual men.").

[171] Susoeff, *supra* note 170, at 881.

[172] Elovitz, *supra* note 170, at 217.

[173] *Id.* at 216.

[174] *See, e.g., In re* Pima County, *supra* note 167, at 838 (asking an openly bisexual man if he would try to "convert" the child to homosexuality).

[175] S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980).

[176] N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980).

environment might incline the child toward homosexuality.[177] Such notions "incorrectly assume that children acquire their sexual orientation by imitating their parents."[178] This is both scientifically unfounded and logically impossible. "Gays and lesbians don't hatch from eggs. Most are born to heterosexual parents."[179] Research indicates that sexual orientation is formed very early in life and attributed primarily to genetic factors.[180] Furthermore, such studies also indicate that children raised in gay and lesbian families do not significantly differ in their psychosocial development from children raised by heterosexual parents.[181]

The belief that homosexuals will actively "recruit" their children to homosexuality flies in the face of experience and logic.[182] First, as previously discussed, parents have no such actual power.[183] Secondly, it is inconceivable why any parent, regardless of sexual orientation, would want such a fate for their child—a fate that very often subjects the homosexual child to discrimination and hatred.[184]

Probably the strongest policy argument articulated by

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[177] *Id.*

[178] *See* Ali, *supra* note 165, at 1017; Carol Warren, *Homosexuality and Stigma, In Homosexual Behavior: A Modern Reappraisal* 123, 130 (Judd Marmor ed., 1980) (concluding that children do not develop their sexual orientation by emulating their parents); Suseoff, *supra* note 170, at 882 ("[E]very study on the subject has revealed that the incidence of same-sex orientation among the children of gays and lesbians occurs as randomly and in the same proportion as it does among children in the general population; as they grow up, children adopt sexual orientations independently from their parents.").

[179] Mishra, *supra* note 165, at 98 (quoting Fran Hathaway, *Good Parents May Happen to be Gay*, PALM BEACH POST, Aug. 18, 1996, at 2F).

[180] *Id.*

[181] Lin, *supra* note 142, at 776.

[182] Lin, *supra* note 142, at 777.

[183] *Id.*

[184] *Id.*

courts[185] and commentators against equal parental rights for homosexuals is that children raised by homosexuals will be subjected to hate, ridicule, and social stigma.[186] One court noted that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its [sic] 'peers and with the community at large.'"[187] Another court noted that "we cannot lightly dismiss the fact that living in the same house with their mother and her [lesbian] lover may well cause the children to [sic] 'suffer from the slings and arrows of a disapproving society.'"[188] These statements illustrate the strong prejudice that exists against homosexuals and how that prejudice may be fueled by the severity by which children tease each other.[189]

Research indicates that that these concerns are largely overstated.[190] Studies indicate that harassment of children based on having same-sex parents occurs at relatively low levels.[191] In fact, researchers put instances of harassment of such children at as low as five percent of those surveyed.[192] Further, it has been

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[185] *See* Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995).

[186] Lin, *supra* note 142.

[187] *Bottoms*, 457 S.E.2d at 108 (quoting Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985)).

[188] *Jacobson*, 314 N.W.2d at 81.

[189] Lin, *supra* note 142, at 777; Suseoff, *supra* note 170, at 881.

[190] *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459, 568 (1990) (citing a 1989 survey finding that 80% of daughters and more than 80% of sons of lesbian mothers reported that they were liked "much more," "somewhat more," or "as much" by their peers as other classmates, compared to 75% of daughters and more than 80% of sons of heterosexual mothers); *id.* at 569 (citing a review of all reported custody and visitation cases involving lesbian and gay parents as of 1989 that found only one case of teasing related to a parent's sexual orientation).

[191] Elovitz, *supra* note 170, at 215.

[192] *Id.*

found that such harassment usually occurs in minor forms that do not typically result in any long lasting psychological damage.[193]

Courts claiming to uphold the best interests of children when denying equal parental rights to same-sex couples only perpetuate discrimination against homosexuals. Furthermore, such decisions conflict with binding precedent. In *Palmore v. Sidoti*, the U.S. Supreme Court held that "the law cannot, directly or indirectly, give [other people's biases and prejudices] effect...."[194]

New Jersey public policy greatly favors prompt establishment of legal parenthood. The State wants parents to care for and maintain their children and alleviate the taxpayer from that duty. Furthermore, it is clear that any child is benefited by having two legal parents responsible for his or her well-being.[195] In fact, declaring as many parents of a child as possible fulfills the state's goal of promoting parenthood and supports the stability of parent-child relationships.[196]

New Jersey public policy has always been to support the best interests of children even when that means recognizing the rights of non-traditional families.[197] These non-traditional families have increasingly included gay and lesbian parents and their children.[198] Accordingly, the objective of recognizing and protecting the familial relationships of children that grow up in these families is an important and frequently recurring theme in

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[193] *Id.*

[194] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[195] C.M. v. C.C., 377 A.2d 821, 825 (N.J. Super. Ct. 1977) ("It is in a child's best interests to have two parents whenever possible.").

[196] *See infra* note 208.

[197] V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000), *cert. denied* 531 U.S. 926, 121 (2000) ("At the heart of the psychological parent cases is the recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."); *In re* H.N.R., 666 A.2d 535, 541 (N.J. Super. Ct. App. Div. 1995) (recognizing right of same-sex partner to adopt partner's biological child stating, "we think it is plain that thebest interest of the twins will be served by according them the full range of legal and financial benefits attendant upon a legally cognizable parental relationship").

[198] *In re* H.N.R., 666 A.2d at 541.

New Jersey family law.[199]

B. STATUTORY IMPLICATIONS

1. The Uniform Parentage Act

In 1973, there was a "'revolution in the law of determination of parentage'" when the Uniform Law Commissioners of the National Conference of Commissioners on Uniform State Laws (ULC) promulgated the Uniform Parentage Act."[200] The U.S. Supreme Court had been working to eliminate barriers to parentage based on the marital status of parents.[201] Thus, the new Act was said to be a "law for a new generation."[202] Rather than discriminating against children born outside of the traditional model of marriage, the Act declared that "[t]he parent and child relationship extends equally to every child and every parent regardless of the marital status of the parent...."[203] The ULC also stated "rules establishing legal parentage for children conceived other than by sexual intercourse, [i.e., in vitro fertilization and artificial insemination] and possibly carried by a woman other than the legal mother."[204]

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[199] *See* Sorentino v. Family and Children's Soc. Of Elizabeth, 378 A.2d 18, 23 (N.J. 1997) (recognizing that an important policy of the Adoption Act is "the protection of the stability and permanence of the new familial grouping"); Sees v. Baber, 377 A.2d 628, 639 (N.J. 1977) ("the psychological aspect of parenthood is more important in terms of the development of the child and its mental and emotional health than the coincidence of biological or natural parenthood");*In re* J.M.G., 632 A.2d 550 (interpreting so-called "stepparent" exception in adoption statute to apply to same-sex partner seeking to adopt partner's child and finding "the public policy of New Jersey is to protect the best interests of the child above rigid construction of the term 'family'").

[200] *In re* Robinson, 890 A.2d 1036, 1039 (N.J. Super. Ct. 2005). *See generally,* 2002 National Conference of Commissioners on Uniform State Laws, *Summary*, 2002 [hereinafter Commission].

[201] *In re* Robinson, *supra* note 9.

[202] Commission, *supra* note 200.

[203] *In re* Robinson, *supra* note 9 (citing the Uniform Parentage Act *available at* http://www.nccusl.org/Update/unifromactsummaries/uniformacts-s-ups.asp).

[204] *Id.*

As recognized by the ULC revisions in 2000 and 2002, the definition of "parenthood" has changed as the boundaries of conception and fertilization have expanded.[205] The commission found that "'[l]egal parenthood…is more complicated' and can be, for example, the 'one who carries a child to birth (rather than the one whose egg has been fertilized)…[or] a man married to the birth mother at conception.'"[206] While the ULC may not have contemplated same-gender parents as it expanded notions of family, it clearly understood that dynamic times call for laws that are sensitive to the advances of science and to changing dynamics of the structure of the family.[207]

2. The Artificial Insemination Act

In 1982, the Artificial Insemination Act[208] was passed by the New Jersey State Legislature as part of the adoption of the Uniform Parentage Act.[209] The Legislature's intent in adopting the Act was "to establish the principle that regardless of the marital status of the parents, all children and parents have equal rights with respect to each other and to provide a procedure to

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[205] *Id.*

[206] *Id.* The Commission also stated:

> If a couple consents to any sort of assisted conception, and the woman gives birth to the resultant child they are the legal parents. A donor of either sperm or eggs used in an assisted conception may not be a legal parent under any circumstances…The new Uniform Parentage Act is important to parents and children. We must recognize the obligations of parents in any possible combination and permutation of marriage of the parents, method for conception of the child, and arrangements that intended parents make to have children. Otherwise we have children for whom nobody has responsibility…It is necessary law for the new century.

Id. at 1039-40.

[207] *Id.*

[208] § 9:17-44(a).

[209] N.J. STAT. ANN. § 9:17-40 (West 2007).

establish parentage in disputed cases."[210] Taking this legislative intent into consideration, it is clear that the statute should allow the non-genetic parent of the child to be deemed the child's legal parent before birth in cases involving the use of alternative insemination.[211]

Several New Jersey Appellate Division courts have held that when parent-child relationships are at issue, statutes must be construed to afford same-sex couples and their children the same rights as heterosexual couples and their children.[212] In the case of *In re H.N.R*, the Appellate Division held that interpreting the stepparent portion of the adoption statute[213] to exclude committed same-sex couples does not serve the best interests of the child and produces a "wholly absurd and untenable result."[214] The court reasoned that even though the term "stepparent" insinuated marriage, the statute should not be interpreted to deny the same protections for a same-sex second parent simply because the same-sex couple is not allowed to marry.[215] The court stated:

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[210] Fazilat v. Feldstein, 848 A.2d 761, 765 (N.J. 2004), (citing Assembly Judiciary, Law, Public Safety and Defense Committee, Statement to Senate Bill No. 888, at 1 (Oct. 7, 1982)).

[211] *In re* Robinson, *supra* note 9, at 172.

[212] *See generally,* Petitioners' Brief, *In re* Robinson, *supra* note 48.

[213] N.J. STAT. ANN. § 9:3-50 (West 2007).

[214] *In re* H.N.R., 666 A.2d at 538.

[215] In upholding same-sex second parent adoptions, the court wrote:

> Although the precise circumstances of these adoptions may not have been contemplated during the initial drafting of the statute, the general intent and spirit of [the adoption statute] is entirely consistent with them. The intent of the legislature was to protect the security of family units by defining the legal rights and responsibilities of children who find themselves in circumstances that do not include two biological parents. Despite the narrow wording of the step-parent exception, we cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a [same-sex] partner. Such a narrow construction would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisputably in the best

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.[216]

3. The Law Against Discrimination (LAD)

"New Jersey governmental entities are, of course, bound by the Law Against Discrimination (LAD)."[217] Accordingly, they are prohibited from withholding or denying benefits or privileges "to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality of such person."[218] An application of New Jersey's Artificial Insemination Statute restricting automatic parental status to males violates the LAD.[219] Female same-sex partners are especially discriminated against by a gender-based application of the Artificial Insemination Statute.[220]

It has been argued by the New Jersey Attorney General's Office that New Jersey's Artificial Insemination Statute should not be applied to same-sex couples.[221] Such arguments urge the courts to apply a plain-language reading of the Artificial Insemination Statute.[222] On its face, the statute does not address

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interests of children."

In re H.N.R., 666 A.2d at 539.

[216] *Id.* at 540.

[217] Dale v. Boy Scouts of America, 734 A.2d 1196, 1212 n.7 (N.J. 1999) *overturned on other grounds,* 530 U.S. 640 (2000).

[218] N.J. STAT. ANN. § 10:5-12 (West 2007).

[219] *See generally*, Petitioners' Brief, *In re* Robinson, *supra* note 48.

[220] § 9:17-44(a).

[221] *See, e.g.*, *In re* Moses, No. FD-12-226-06C.

[222] § 9:17-44(a).

the issue of same-sex couples and refers only to "husbands" as being protected by the statute's provisions.[223] However, the application of the Artificial Insemination Statute to only heterosexual couples flies in the face of the legislative intent behind the statute.[224]

Finally, the Alternate Insemination Statute was passed before sexual orientation was included in the LAD.[225] This fact provides guidance regarding the interpretation of the earlier statute. Such guidance suggests that the term "husband" should now be read in gender-neutral terms. [226]

4. Interpretive Trends

When interpreting statutes in a manner that gives protection to all families, not just "traditional" ones, courts uphold an important state interest.[227] This interest is the elimination of discrimination based on sexual orientation.[228] The desire to eliminate such discrimination has been repeatedly promoted by both the New Jersey State Legislature[229] and the State courts.[230]

Other states have begun to interpret their alternative insemination statutes to apply equally to same-sex couples. For example, in 2004 the Court of Appeals of Indiana (an extremely conservative state) held that "no [legitimate] reason exists to provide that children born to lesbian parents through the use of

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[223] *Id.*

[224] *Id.*

[225] § 10:5-12.

[226] It is important to note that when two statutes conflict, the one passed later in time governs. Woodhull v. Manahan, 204 A.2d 212 (N.J. Super. Ct. App. Div. 1964).

[227] *Id.*

[228] AV: Dale v. Boy Scouts of America, 160 N.J. 562, 620 (1999).

[229] *See, e.g.*, The Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 (West 2007).

[230] *See, e.g.*, *Dale*, 160 N.J. 562 (holding that a compelling need existed to end the "unique evils" of "the cancer of discrimination" against gays and lesbians).

reproductive technology with less security and protection than to children born to heterosexual parents through artificial insemination."[231] Similarly, the Massachusetts Supreme Court has explicitly affirmed the practice of issuing pre-birth court orders to non-biological parents when there is no dispute between any of the parties.[232] Many courts across New Jersey and the rest of the nation have stated that they "cannot close our eyes to the legal and societal needs of our society; the strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs."[233]

The notion that a family unit must have one father and one mother is "an anachronism that no longer fits contemporary society."[234] Accordingly, New Jersey's Artificial Insemination Statute "must be interpreted to allow for those changes."[235] As such, courts should interpret the statute in favor, rather than in opposition to parent-child relationships.[236] In doing so, courts would be serving the legislative intent of the drafters of the

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[231] *In re* A.B., 818 N.E.2d 126, 131 (Ind. Ct. App. 2004).

[232] *See generally*, Petitioners' Brief, *In re* Robinson, *supra* note 48 (citing Culliton v. Beth Israel Deaconess Hosp., 756 N.E.2d 1133 (Mass. 2001)).

[233] *See generally*, Petitioners' Brief, *In re* Robinson, *supra* note 48 (citing *id.*).

[234] *See* Jersey Shore Med. Ctr. – Fitkin Hosp. v. Baum, 417 A.2d 1003, 1008 (N.J. 1980).

[235] *In re* H.N.R., 666 A.2d at 540. The court also stated:

> It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon dissolution.... It is surely in the best interest of children, and the state, to facilitate adoptions in these circumstances so that legal rights and responsibilities may be determined now and any problems that arise later may be resolved within the recognized framework of domestic relations law.

Id.

[236] *See* Petitioners' Brief, *In re* Robinson, *supra* note 48.

statute and the best interests of the children they are bound to protect.

Furthermore, while the Artificial Insemination Statute causes confusion because of its use of the term "husband," rather than "partner," this confusion can be cleared up by reading the Artificial Insemination Statute within the broader context of the State's statutory scheme. Indeed, the New Jersey Parentage Act,[237] of which the insemination statute is a part, states that the "parent and child relationship extends equally to every parent, regardless of the marital status of the parent."[238] Therefore, it is clear that the drafters of the statute intended that it be applied in a non-discriminatory manner. This lends further credence to the argument that the Artificial Insemination Statute should be applied to same-sex couples.

C. CONSTITUTIONAL IMPLICATIONS

Courts frequently state that adoption is a privilege, not a right.[239] Accordingly, individuals seeking to adopt or obtain custody of children generally do not enjoy the same constitutional protections as biological parents.[240] However, when statutes are interpreted in a way that treats an entire class of prospective parents in a manner unequal to others, the doctrine of equal protection is clearly implicated.

Applying New Jersey's Artificial Insemination Statute[241] exclusively to heterosexual couples violates the New Jersey State Constitution.[242] Article I, paragraph 1, of the New Jersey Constitution guarantees Equal Protection under the law to New Jersey citizens.[243] The right to Equal Protection has long been

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[237] § 9:17-40

[238] *Id.*

[239] *See* Stanley v. Ill., 405 U.S. 645, 651 (1972); Meyer v. Neb., 262 U.S. 390, 399 (1923).

[240] *Id.*

[241] § 9:17-44(a).

[242] N.J. CONST. art. 1.

[243] Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465 (N.J. 1978).

regarded as one of the most powerful and important principles of the New Jersey State Constitution.[244] Accordingly, it has been construed to offer a very broad standard of protection to the civil liberties of the citizens of New Jersey.[245]

In *Caviglia v. Royal Tours of America*, [246] the New Jersey Supreme Court stated:

> When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test. That test weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." We require that the means selected by the Legislature "bear a real and substantial relationship to a permissible legislative purpose."[247]

The right to have a family involves a fundamental privacy interest, namely, that of familial relationships and raising a child.[248] Accordingly, the State's burden to justify the differential treatment and encroachment upon this fundamental area of autonomy is heightened.[249]

Any litigant who attacks the constitutionality of a statute must show that there is no reasonable basis for sustaining it, and where a statute's constitutionality is fairly debatable, courts

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[244] Greenberg v. Kimmelman, 494 A.2d 294 (N.J. 1985).

[245] *Id. AV:* Petitioners' Brief, *In re* Robinson, *supra* note 48.

[246] Caviglia v. Royal Tours of Am., 842 A.2d 125 (N.J. 2004).

[247] *Id.* at 132 (quoting *Greenberg* 494 A.2d at 302). *See also* Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 364 A.2d 1016, 1037 (N.J. 1976), *cert. denied*, 430 U.S. 977 (1977).

[248] *See* Snyder v. Mekhjian, 593 A.2d 318, 325 (N.J. 1991) (Pollack, J., concurring) ("The protection of autonomy is limited to a few 'fundamental' areas, including marriage, procreation, contraception, family relationships, child rearing, and education.").

[249] *See* Petitioners' Brief, *In re* Robinson, *supra* note 48.

will uphold the law.[250] The only basis for upholding a reading of New Jersey's Artificial Insemination Statute[251] that excludes heterosexual couples is discrimination. When a deferential application of a statute is solely discriminatory in effect, it is clearly unreasonable. In reviewing deferential treatment under statutes, the crucial issue is whether there is an appropriate government interest "suitably furthered" by such treatment.[252] The furtherance of discrimination can in no way be said to further any appropriate government interest.

Denying children born to same-sex couples using alternative insemination the same security that is afforded to children born to heterosexual married couples who use the same technology not only fails to serve any *appropriate* government interest, it fails to serve any interest at all. Indeed, the Appellate Division has held: "To deny the children of same sex partners, as a class, the security of a legally recognized relationship with their second-parent serves no legitimate state interest."[253]

Statutes should always be applied in a manner that prevents invalidity on constitutional grounds.[254] A challenged statute should be construed in a manner that avoids giving rise to serious constitutional questions.[255] When a statute's constitutionality is doubtful, a savings reading of that statute is appropriate since there is an "assumption that the Legislature

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[250] Newark Superior Officers Ass'n v. City of Newark, 486 A.2d 305 (N.J. 1985).

[251] § 9:17-44(a).

[252] Borough of Collingswood v. Ringgold, 331 A.2d 262 (N.J. 1975).

[253] *In re* H.N.R., 666 A.2d 535, 540 (quoting *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993)).

[254] State v. May, 829 A.2d 1106 (N.J. Super. Ct. App. Div. 2003) (citing Hamilton Amusement Ctr. v. Verniero, 716 A.2d 1137 *cert. denied*, 527 U.S. 1021 (1998)); *see also*, Holster v. Bd. of Trs. of the Passaic County College, 279 A.2d 798, 801 (N.J. 1971) (the court said: "It is an accepted principle of statutory interpretation that, if possible, legislation will be so read as to sustain its constitutionality"); Camden City Bd. of Ed. v. McGreevey, 850 A.2d 505 (N.J. Super. Ct. App. Div. 2004).

[255] Silverman v. Berkson, 661 A.2d 1266, 1268 (N.J. 1995) (citing New Jersey Bd. of Higher Ed. v. Shelton College, 448 A.2d 988 (N.J. 1982)).

intended to act in a constitutional manner."[256]

Clearly, the application of New Jersey's Artificial Insemination Statute that treats same-sex couples (and, indeed, women in general) in a manner unequal to their heterosexual (or male) counterparts is unconstitutional. Therefore, the Artificial Insemination Statute should be construed to apply to same-sex couples in light of the New Jersey Supreme Court's recent decision in *Lewis*. Furthermore, the statute should be given a gender neutral reading that abides by the equal protection provision of the New Jersey Constitution.[257]

V. CONCLUSION

The quest for equality for gays and lesbians may be the last frontier in the American Civil Rights Movement. While the rights of same-sex couples have made tremendous strides in New Jersey and other states, an abundance of work remains to be done. However, the issue at hand is about more than the rights of homosexuals – it is about the best interests of children. As this article describes, laws that discriminate against gays and lesbians can have a devastating impact not only on individuals, but on families as well.

The determination of parentage before birth is vital for many reasons that effect the child's welfare and best interests. Timing is very important. It is far better to determine parentage sooner rather than later to remove any uncertainty, confusion, or anxiety about legal rights. This allows parents to focus their time, energy, and resources on customary issues surrounding birth and delivery, rather than legal issues created by disinterested parties motivated by ideology and politics.

Therefore, the New Jersey State Legislature should immediately revise New Jersey's Alternate Insemination Statute to apply directly to same-sex couples. They should do so in order to provide uniformity in state judicial proceedings, to conform to the New Jersey Supreme Court's ruling in *Lewis*, and to ensure that the best interests of children are given the respect mandated by the law.

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[256] Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

[257] N.J. CONST. art. 1.